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SUPREME COURT OF THE UNITED STATES

October Term 1946

No. 183

RALPH HENRY CAHOON, JR., *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONER'S REPLY
to Brief in Opposition

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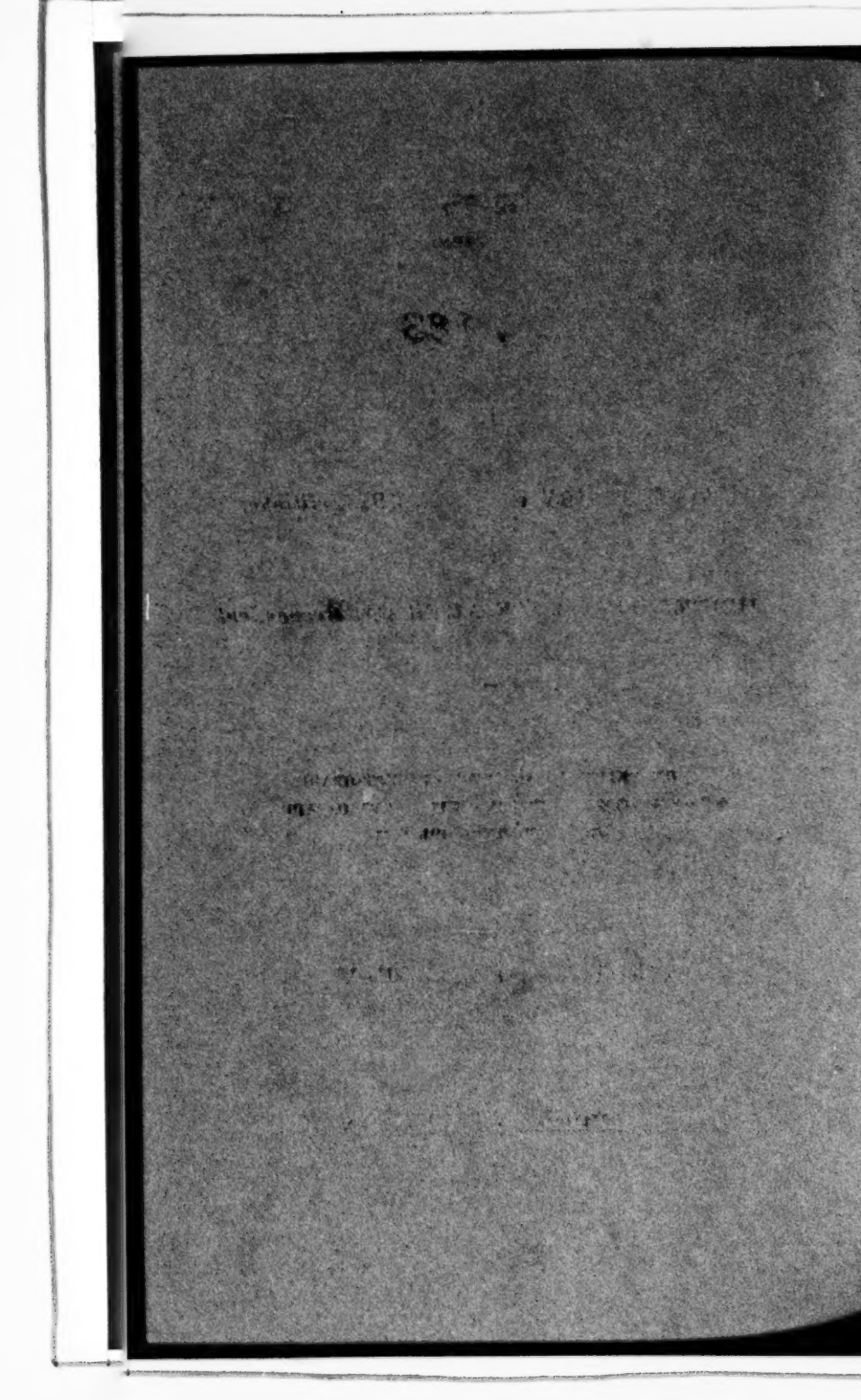

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MAY IT PLEASE THE COURT:

The Government erroneously requests the court to hold that petitioner did not exhaust his administrative remedies so as to be able to challenge the validity of the draft-board order in response to the indictment. For this reason the Government says that the petition presents no question requiring further review by this court, because the holding in *Falbo* v. *United States* is applicable.

The Government misinterprets the Act and Regulations.

The *Falbo* decision is inapplicable because the Act and Regulations have been amended, changing the procedure since the *Falbo* decision. The Act and Regulations provide

for the predetermination of acceptability of the registrant before issuance of the order to report for induction, making inapplicable *Falbo* v. *United States,* 320 U. S. 549. Section 3 (a) of the Selective Training and Service Act provides, *inter alia,* " . . . no man shall be inducted for training and service under this Act unless and until he is *acceptable* to the land or naval forces for such training and service and his physical and mental fitness for such training and service has been satisfactorily determined: . . . [Emphasis added]" 50 U. S. C. App. § 303 (a).

Section 4 (a) of the Act provides that when the induction of a registrant "will shortly occur" he shall, "upon request, be ordered by his local board . . . for a preinduction physical examination, subject to reexaminations."

"The commanding officer of such induction station where such physical examination is conducted under this provision shall issue to the registrant a certificate showing his physical fitness or lack thereof, and this examination shall be accepted by the local board, subject to periodic reexamination. Those registrants who are classified as I-A at the time of such physical examination and who are found physically qualified for military service as a result thereof, shall remain so classified and report for induction in regular order." (57 Stat. 599, 50 U. S. C. App. § 304 (a))

History of the amendment of the Selective Training and Service Act, as enacted December 5, 1943, shows clearly that Congress intended to eliminate entirely the process of determining acceptability of registrants ordered to report for induction into the armed forces simultaneously with their reporting for induction. It was the intention of Congress to have the acceptability of such registrants predetermined before the order to report for induction was issued. This was intended by Congress in order to alleviate the hardships and sufferings caused by possible rejection of men, who being ordered to report for induction, had wound up their personal affairs prior to reporting

for induction; and when thereafter, upon their rejection simultaneously with their reporting at the induction station, they would be compelled to return to their respective communities to begin life anew. (See 89 *Cong'l Record* 8079, Oct. 5, 1943.) The effect of this change in the Act was recognized by the court in *Billings* v. *Truesdell,* 321 U. S. 542, 554-555, where amendment to the Regulations is discussed.

By Amendment No. 200 (9 F. R. 440-442), effective January 10, 1944, the present procedure for preinduction physical examination was established. See Section 629 of the Selective Service Regulations. This procedure for preinduction physical examination by the armed forces was operative for registrants to be inducted into the armed forces.*

At the time Falbo reported for induction the Regulations prescribing the procedure for physical examination of registrants classified as liable for training and service in the *armed forces* did not provide for preinduction physical examination. The only examination given such registrants at such time by the armed forces to determine their acceptability for the land or naval forces was simultaneous with their reporting for induction. Thus prior to the amendment on December 5, 1943, it was necessary for one to report in order to exhaust his administrative remedies by undergoing the preinduction physical examination then given simultaneously with the registrant's reporting at the induction station pursuant to the order of the board. *Billings* v. *Truesdell,* 321 U. S. 542, 558-559.

At the time Falbo was ordered to report for *work of national importance,* however, the Regulations provided specifically for a *preinduction physical examination* to be

* This preinduction procedure, pursuant to the amendment to the Act, is more extensively discussed in the petition for writ of certiorari in Rinko *v.* United States, No. 1071, October Term 1944, at pages 25-34. It was specifically presented to the court in Flakowicz *v.* United States, No. 1072 October Term 1944; see petition for writ of certiorari, pages 16-18.

given *prior to issuance* of the order to report for work of national importance. (Regulations 651.7-651.9) See Government's brief in *Falbo* v. *United States,* No. 73 October Term 1943, pp. 44, 56, 107-108.

At the time Falbo was ordered to report there was no provision for the examination at the CPS camp of *all* registrants who were ordered to report for work of national importance. Examination at the camp was provided only for assignees who, upon reporting, indicated that there had been a change in physical condition since "the final-type physical examination for registrants in Class IV-E." (Reg. 653.11 (c)) See Government's brief in *Falbo* v. *United States,* No. 73 October Term 1943, pp. 56, 113.

Therefore the statement of the Government's brief in opposition in this case, that Falbo still might have been rejected had he reported at the CPS camp, is erroneous. See "Brief for the United States in Opposition", p. 8.

Moreover, the statement of this court in *Falbo* v. *United States* (320 U. S. 549, 553), that the conscientious objector could be rejected at the civilian public service camp, also is incorrect, being a misinterpretation of the Regulations.*

The Regulations did not provide for the examination of Falbo had he reported at the camp, unless he had experienced a change in physical condition. This would mean that unless he had been struck by lightning, run down by an automobile, or overtaken by galloping tuberculosis he certainly would be precluded from requesting a physical examination at the camp to determine anew his acceptability. Certainly the contingency of a change is too vague and indefinite to require every assignee to report to exhaust his administrative remedies.

* Because of this misinterpretation by the court of the Regulations in this respect, this court is being requested in the joint brief filed for petitioners in Gibson *v.* United States (No. 23 Oct. T. 1946) and Dodez *v.* United States (No. 86 Oct. T. 1946) to reconsider its decision in Falbo *v.* United States, 320 U. S. 549, and to declare that decision erroneous.

Inasmuch as Falbo had exhausted his administrative remedies, and since amendment of the Act in 1943 requiring preinduction physical examination for registrants ordered to report for training and service in the armed forces, it cannot be said that it was necessary for Cahoon to proceed to the induction station and undergo a second preinduction physical examination. The amendment to the Act and Regulations providing for the preinduction physical examination that preceded the issuance of the order to report for induction, when complied with by Cahoon effected fully exhaustion of his administrative remedies. His acceptability had been then finally determined. At that point, as to him, the selective process had been completed.

If the Government's argument is correct, then the purpose of Congress in enacting the amendment on December 5, 1943, and the purpose of the President in promulgating Section 629 of the Regulations in January 1944, will have been frustrated and vitiated. In fact, the construction that the Government attempts to induce this court to place upon the Act and Regulations repeals the amendments to the Regulations providing for the predetermination of a registrant's acceptability before issuance of the order to report. Certainly such important matters of policy and clearly expressed intentions of the Congress and the President cannot be expressly overruled by adoption of legerdemain construction proposed by the Government at this time for imposition upon the Act and Regulations.

This court's very act of granting the petition for writ of certiorari in *Dodez* v. *United States* (No. 86 Oct. T. 1946), which case is identical in every respect with the *Falbo* case, shows that this court did not intend to accept the construction the Government here proposes be placed upon the Act. If Falbo had not exhausted his administrative remedies, then Dodez had not. If Dodez had completed the selective process and exhausted his administrative reme-

dies[1] then by force of the same reason Falbo had completed the selective process. Since it is reasonably clear that Dodez had completed the selective process by taking the preinduction physical examination under the identical Regulations involved in the *Cahoon* case, it is also clear that Cahoon had exhausted his administrative remedies upon the completion of the selective process which was determined upon his submitting to the preinduction physical examination before the order to report for induction was issued.[2]

Inasmuch as the court granted the petition for writ of certiorari in the *Dodez* case, the court should grant the petition in this case. The instant case presents to this court a question similar to that presented in *Dodez* v. *United States,* No. 86 Oct. T. 1946. Since the questions urged in the *Dodez* case were deemed sufficiently substantial to justify granting of the writ, similar and correlative questions here presented should likewise be considered substantial enough to warrant the granting of the writ of certiorari prayed for by petitioner.

RALPH HENRY CAHOON, *Petitioner*

By HAYDEN C. COVINGTON
Counsel for Petitioner

July 25, 1946

[1] The Government concedes this. See its original brief filed in Gibson v. United States, No. 221 Oct. T. 1945, pp. 15-16, 17, 53-58.

[2] It should be observed that the court below in its opinion on petition for rehearing did not hold that petitioner did not exhaust his administrative remedies. In fact it assumed that he did and ruled against him on the theory that the errors committed by the trial court were harmless.